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IN THE

Supreme Court of the United States

OCTOBER TERM—1953

No. 253

BUSH TERMINAL BUILDINGS COMPANY,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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COMMISSIONER OF INTERNAL REVENUE,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The undersigned, on behalf of the Bush Terminal Buildings Company, prays that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Second Circuit.

Opinions Below

The opinion of the Court of Appeals (R. 108) is reported in 204 F. (2d) 575. The opinion of the Tax Court (R. 57-74) is reported at 17 T. C. 485.

Jurisdiction

The judgment of the Court of Appeals was entered on May 15, 1953 (R. 114). The jurisdiction of this Court is invoked under Section 1254 of Title 28 of the United States Code.

Questions Presented

I

1. Whether petitioner had taxable income from the purchase of its own bonds in 1941 at prices below the par value thereof.

II

2. Whether the net operating loss carry-over for the years 1939 and 1940, as shown in respondent's deficiency notice for 1941 (R. 4), should be increased by the amount of:

(a) The taxable income attributed to petitioner account of its purchase of its own bonds in 1940 at prices below the par value thereof;

and

(b) The expense incurred in litigation involving solely petitioner's right *as a tenant* to the use and occupancy of a Power House.

Statutes and Regulations Involved

The statutes and regulations involved are set forth in the Appendix, *infra*, pages 1a-5a.

Statement

The facts involved may be summarized as follows:

I

On January 1, 1941, petitioner had outstanding $6,880,000 principal amount of First Mortgage 5% bonds due in 1960 secured by lien upon all the company's real property (R.

7). In 1941 petitioner purchased in the open market, on the New York Stock Exchange, a principal amount of $749,000 of these bonds at a total purchase price of $563,812.50 (R. 7). The unamortized discount on said bonds at the time of their purchase was $26,480.95 (R. 7). The difference between the par value of these bonds and their purchase price, plus unamortized discount, amounted to $158,706.55 (R. 7). This amount petitioner excluded from its gross income in 1941 in accordance with the provisions of Section 22 (b) (9) of the Internal Revenue Code, as amended by the Revenue Act of 1942, and also in accordance with the original provisions of said Section as enacted in 1939.

Petitioner was in Bankruptcy during all of 1940 and 1941, under 77B of the National Bankruptcy Act, and was under the jurisdiction and regulatory power of the United States District Court for the Eastern District of New York (R. 30, 65). Pursuant to the provisions of Section 22 (b) (9) of the Internal Revenue Code as originally enacted in 1939, the United States District Court for the Eastern District of New York, by and through its Chief Judge who had jurisdiction of said Bankruptcy proceeding, CERTIFIED to the Commissioner of Internal Revenue that during all of the years 1940 and 1941 petitioner was in *"an unsound financial condition"* (R. 49, Ex. 7).

Petitioner's operations showed a taxable loss in every year from 1935 to 1939, inclusive,—except in 1937 when it had a small taxable profit of $27,803.20. Its total taxable loss from 1935 to 1939, inclusive, was $1,032,647.05 (7 T. C. 796). And its net taxable loss in 1940 (exclusive of gain from the purchase of its own bonds) amounted to over $400,000 (R. 4 and 7 T. C. 803).

The Court of Appeals affirmed (R. 109-110) the Tax Court's opinion, holding that Section 22 (b) (9), as amended

by the Revenue Act of 1942, was not retroactive to 1941. The Court of Appeals also affirmed (R. 110-111) the Tax Court's opinion that a Federal Court having complete regulatory power and control over a corporation in Bankruptcy, was not a *"Federal agency"* within the meaning of Section 22 (b) (9) prior to its amendment in 1942. Why the term *"any* Federal agency", as used by Congress, does not include a Federal Court, the Court of Appeals does not undertake to say.

Though petitioner was in Bankruptcy in 1941, under 77B of the Bankruptcy Act, and showed operating losses of $1,032,647.05 for the period 1935 to 1939, inclusive (7 T. C. 796), and operating losses of over $400,000 for 1940 (R. 4, and 7 T. C. 803), the Court of Appeal never-the-less concluded that the determination of the Commissioner that petitioner was not *"in an unsound financial condition"* in 1941 was conclusive.

II

The second issue herein, involving the determination of the correct net operating loss to be carried over to 1941, includes in part the same basic issue as set forth above under subdivision I, namely: the taxable status of the gain from petitioner's purchase of its own bonds in 1940 at prices below the par value thereof. The same statutory provisions apply to the bonds purchased in 1940 as apply to those purchased in 1941. The amount of this gain which the Tax Court included in petitioner's taxable income in 1940 was $242,790.36 (7 T. C. 803).

The remaining part of the issue under subdivision II hereof pertains to expenses incurred in 1939 and 1940 in litigation involving petitioner's right *as a tenant* to the *use and occupancy* of a Power House. The amount of these expenses was $48,517.98 (R. 38, 43). No part of these expenses pertained to or involved in any way petitioner's acquisition of a capital asset or petitioner's protection or acquisi-

tion of title to *any* property (R. 27-28). The question of *title* to property is in no way involved in this issue (R. 27-28, 105). The title and complete ownership of the property at all times belonged to the defendant in the suit (R., pp. 27-30). The entire litigation pertained solely to petitioner's right *as a tenant* to the *use and occupancy* of the Power House (R. 28). The Court of Appeals, however, held that such litigation expense was a cost incurred in "defending * * * *title* to property" (R. 112-113), and therefore not deductible from taxable income.

Assignment of Errors

The Court of Appeals erred:

1. In holding that the provisions of Section 22 (b) (9) as amended by the Revenue Act of 1942, were not retroactive to and including 1940 and 1941.

2. In holding that the term "*any* Federal agency *authorized* to exercise regulatory power over such corporation", as used in Section 22 (b) (9) prior to its amendment in 1942, did not include a Federal District Court which was *authorized* and did exercise complete regulatory power over petitioner in 1940 and 1941 when it was in Bankruptcy.

3. In holding that there was no showing of gross error on the part of the Commissioner in his failure to find that petitioner was in an unsound financial condition in 1940 and 1941.

4. In holding that the expenses of litigation involving petitioner's right *as a tenant* to the *use and occupancy* of a Power House were expenses incurred in "defending * * * title to property".

Reasons for Granting the Writ

In reaching its conclusions the Court below made several rulings which create conflict with other decisions and which cause confusion and discrimination in the administration of the revenue laws.

I

Bond Purchase Issue

1. The decision of the Court below (R. 109-110) that the provisions of Section 22 (b) (9) as amended by the Revenue Act of 1942, were not retroactive to and including 1940 and 1941 disregards the express provisions of the statute. The decision is not only in conflict with the statute itself, but it is in conflict with the applicable decisions of this Court and of other Courts of Appeal. See *Smietanka* v. *First Trust and Savings Bank,* 257 U. S. 602, 605-606 (1922); *Iselin* v. *The United States,* 270 U. S. 245, 251 (1926); *Crooks* v. *Harrelson,* 282 U. S. 55, 61 (1930); *Helvering* v. *City Bank Farmers Trust Co.,* 296 U. S. 85 (1935); *Commissioner* v. *Korell,* 339 U. S. 619, 627-628 (1950); *Foley Securities Corporation* v. *Commissioner of Internal Revenue,* 106 F. (2d) 731, 734 (C. A. 8th, 1939); *Commissioner of Internal Revenue* v. *Eulcon J. Gracey,* 159 F. (2d) 324, 325 (C. A. 5th, 1947); *Wodehouse* v. *Commissioner of Internal Revenue,* 166 F. (2d) 986, 992 (C. A. 4th, 1948).

In the instant case the Court of Appeals held that Section 22(b)(9) as amended by the Revenue Act of 1942, was not retroactive *because,* as reasoned by the Court, when Congress added Section 22(b)(10) to the Code in 1942 (*an entirely new Section added to the law in that year*) it specifically provided that this latter Section was to be retroactive to taxable years begining after December

31, 1939. The absence of any such provision with reference to Section 22 (b) (9) as amended was in the opinion of the Court of Appeals conclusive evidence that Congress did not intend Section 22 (b) (9) as amended in 1942 to be retroactive. Such a conclusion makes a nullity of the statute. It avoids all real consideration of the specific provisions of the statute. Section 22(b)(9) was already in the Code when the 1942 Revenue Act was passed, and *before* and *after* its amendment it specifically provided *in the last sentence thereof* that the effective date of its operation was to be from *"the date of the enactment of the Revenue Act of 1939"* (App. 1a-2a). Any further provision in this regard would have been mere redundancy. The statutory provisions should control and not some inference or implication drawn from the enactment of some other Section.

The language used by Congress in Section 22 (b) (9) as amended is deprived of *all* meaning unless the amended Section 22 (b) (9) is construed the way it reads; that is, to be applicable to discharges occurring after the enactment of the Revenue Act of 1939. Plainly, the words used by Congress in the concluding sentence of Section 22 (b) (9), as amended by the Revenue Act of 1942, *in no way limit* its application to only "taxable years *beginning after December 31, 1941.*" To so limit it would materially change the law as written. This neither the Commissioner nor the courts can do. *Iselin* v. *The United States,* 270 U. S. 245, 251 (1926); *Crooks* v. *Harrelson,* 282 U. S. 55, 61 (1930). As stated by this Court in *Crooks* v. *Harrelson, supra,* at page 61:

> "* * * the fact must not be overlooked that we are here concerned with a taxing act, *with regard to which the general rule requiring adherence to the letter applies with peculiar strictness.*" (Italics supplied.)

See also *Helvering* v. *San Joaquin Fruit & Investment Co.*, 297 U. S. 496, 499 (1936); *Helvering* v. *Flaccus Oak Leather Co.*, 313 U. S. 247, 249 (1941); *Crane* v. *Commissioner*, 331 U. S. 1, 6-7 (1947); *Commissioner* v. *Korell*, 339 U. S. 619, 627-628 (1950).

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2. As regards the conclusion of the Court below (R. 110-111) that a Federal Court is not a "Federal agency" within the meaning of Section 22(b)(9) prior to its amendment in 1942, we respectfully submit that such a construction violates the long and well established rules of statutory construction. As stated by this Court in the recent case of *Commissioner* v. *Korell*, 339 U. S. 619, at pages 627-628, the *firmly* established principle of tax law is that *"the ordinary meaning of terms is persuasive of their statutory meaning."*

The Court of Appeals in the instant case says in effect that what Congress *intended* to say when it used the term *"any* Federal agency" was "any Federal agency, *except* the federal judiciary". But that, of course, was not what Congress said. And the language used by Congress is meaningless unless Section 22(b)(9) is construed and applied the way it is written. The Court below would create exceptions to the law where no exceptions exist, and would place restrictions on its application which neither Congress nor the regulations prescribed. To say that the term *"any* Federal agency" does not include the federal judiciary is to disregard the plain meaning of the words used. The Court below gives no reason as to why the term *"any* Federal agency" does not include a Federal District Court. In *Crane* v. *Commissioner*, 331 U. S. 1, at page 6, this Court said:

> "* * * the words of statutes—including revenue acts—*should be interpreted where possible in their* ordinary, everyday senses." (Italics supplied.)

In 1940 and 1941 petitioner was in Bankruptcy under 77B of the National Bankruptcy Act. During all of these years the United States District Court for the Eastern District of New York had exclusive jurisdiction over petitioner and exercised complete regulatory power and control over it (R. 30-31; Ex. 7, p. 49). Not only was the said United States District Court *"authorized"* under the Bankruptcy Act to exercise regulatory power over petitioner, but it was *specifically charged with the duty* to do so. It was *"authorized"* to deal summarily with petitioner's property wherever located. Its authority was "exclusive". *It had complete regulatory power over petitioner.*

In accordance with the provisions of Section 22(b)(9) prior to its amendment in 1942, the above mentioned United States District Court for the Eastern District of New York CERTIFIED to the Commissioner that petitioner was in an *"unsound financial condition"* in 1940 and 1941. This certification was made by the Chief Judge of said Court, who was in charge of all of petitioner's Bankruptcy proceedings (R. 30-31; Ex. 7, p. 49). It is, we submt, legally controlling in this case. It supersedes any determination made by the Commissioner. Under the law, such certification, when made by *any* Federal agency authorized to exercise regulatory power over the corporation, is *conclusively* required to be accepted by the Commissioner. This respondent's own regulations admit (Regulations 103, Sec. 19.22(b)(9)-1(a); Appendix herein, pp. 2a-3a).

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3. For the above stated reasons and in accordance with the above cited authorities, the decision of the Court below on the Bond Purchase Issue presented herein should not be allowed to stand. It is, we submit, clearly in conflict with all the applicable decisions of this Court. It

should be noted in this connection that the Court below does not cite a *single* decision of this Court or of any other Court of Appeals in support of its opinion. The applicable decisions of this Court which are cited above should control. We may not speculate as to what Congress might have contemplated or intended. We must construe and apply the law as it is written. *Sabine Transportation Co.* v. *Commissioner,* 5 Cir. 128 F. (2d) 945, affirmed 318 U. S. 306; *Helvering* v. *Credit Alliance Corporation,* 316 U. S. 107.

II

Net Operating Loss Carry-Over

4. The all important question in this proceeding is the correct determination of petitioner's taxable income for 1941. That is the all inclusive issue involved. But in order to properly determine petitioner's taxable income for 1941, it is mandatory, under Section 272(g) of the Internal Revenue Code, that the Court *"correctly"* determine the amount of petitioner's net operating loss carry-over for the two preceding years, 1939 and 1940. Section 272(g) of the Internal Revenue Code provides:

> "Jurisdiction Over Other Taxable Years.—The Board in *redetermining* a deficiency in respect of any taxable year *shall* consider such facts with relation to the taxes for *other taxable years* as may be necessary *correctly* to redetermine the amount of such deficiency, but in so doing shall have no jurisdiction to determine whether or not the tax for any other taxable year has been overpaid or underpaid." (Italics supplied.)

As the record plainly shows in this case, a correct determination of petitioner's tax liability for 1941 can not be made without first determining the *correct* amount of petitioner's carry-over loss for 1939 and 1940. Where

the record shows that errors of law or fact have been made in the determination of petitioner's taxable income for other years involved in the present determination, then such errors must be corrected before the liability for 1941 can be *"correctly"* determined. It is not the net operating loss *figure in some previous tax year* which is to be taken into account, but the *"net operating loss"* itself, by the express words of the statute.

5. As regards the taxable gain from petitioner's purchase of its own bonds in 1940, the same statutory provisions apply to the 1940 purchases as that discussed above for 1941. The same issue is involved for both years.

6. As regards the expenses of litigation, amounting to $48,517.98 and involving *solely* petitioner's right *as a tenant* to the *use and occupancy* of a Power House, the Court below held that these expenses were expenses incurred in "defending * * * title to property". The Court is *grossly* in error in this regard. No *title* whatsoever was involved in connection with these expenses, and the record clearly shows that to be the fact (R. 27-30, 105). The Court below *in its decision* admits that the expenses were for the purpose of determining petitioner's right *"as a tenant to the use and occupancy* of a power house" (R. 112).

The decision of the Court below regarding such litigation expense is not only contrary to the long established rules of law and of the decisions of this Court and other Courts of Appeal, but it is contrary to its own decisions. See *Levitt & Sons, Inc.* v. *Nunan,* 142 F. (2) 795 (C. A. 2nd, 1944); *Hochschild* v. *Commissioner,* 161 F. (2d) 817, 819 (C. A. 2nd, 1947). As stated by the Court below in *Levitt & Sons, Inc.* v. *Nunan, supra,* at page 798:

> "That such payments to *protect* a business generally are 'ordinary' expenses is abundantly settled by authority *and can no longer be questioned.*" (Italics supplied.)

See also *Kornhauser* v. *United States*, 276 U. S. 145, 153 (1928); *Commissioner* v. *Heininger*, 320 U. S. 467, 471-472 (1943); *Rassenfass* v. *Commissioner*, 158 F. (2d) 764, 766-768 (C. A. 7th, 1946). The litigation expense involved in the instant case was made *solely* to protect and preserve petitioner's business (R. 28-30). It was an ordinary and a very necessary business expense. This lawsuit involved a direct assault upon petitioner's business (R. 28-30). The very existence and survival of its business was at stake. In *Commissioner* v. *Heininger, supra*, this Court said, pages 471-472:

> *"For respondent to employ a lawyer to defend his business from threatened destruction was 'normal'; it was the response ordinarily to be expected.* * * * He was placed in a position in which not only his selling methods *but also the continued existence of his lawful business were threatened with complete destruction.* * * * Therefore he did not voluntarily abandon the business but *defended it by all available legal means.* To say that this course of conduct and the expenses which it involved were extraordinarly or unnecessary would be to ignore the ways of conduct and the forms of speech prevailing in the business world." (Italics supplied.)

The grave error into which the Court below fell was in treating an oil lease or mineral lease, in which under local law the lessee has a title or fee in the property and also a right to remove and dispose of certain portions thereof, as being in the same class or category with a lease of industrial space for commercial use. The two types of leases are distinctly different. In one, the lessee does have a title or fee in the property, but in the other the lessee has no title. All of the cases cited by the Court below in support of its decision pertain solely to oil or mineral leases. They have no application whatsoever to the instant case. Regulation 103, Section 19.24-2 (App. 6a herein) which is cited by the Court below in support of its decision (R. 112) is in

no way applicable here, because there is no issue of capital expenditure or title to property involved.

The decision on this issue is directly in conflict with all the applicable decisions of this Court and the other Courts of Appeal. To let it stand would only cause confusion and discrimination in the administration of the revenue laws. If for no other reason, this issue alone should warrant the review of this case by the Supreme Court.

Wherefore, it is prayed that the writ of certiorari should be granted.

Respectfully submitted,

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August, 1953.

APPENDIX

Statutes and Regulations Involved

Statutes Involved

Section 22 (b) (9) of the Internal Revenue Code, as enacted in 1939, provides that the following items *shall not* be included in gross income and *shall be exempt* from taxation under Chapter 1:

"Sec. 22 (b) (9) **Income from Discharge of Indebtedness.**—In the case of a corporation, the amount of any income of the taxpayer attributable to the discharge, within the taxable year, of any indebtedness of the taxpayer or for which the taxpayer is liable evidenced by a security (as hereinafter in this paragraph defined) if—

(A) *it is established to the satisfaction of the Commissioner, or*

(B) *it is certified to the Commissioner by any Federal agency authorized to make loans on behalf of the United States to such corporation or by any Federal agency authorized to exercise regulatory power over such corporation,*

that at the time of such discharge the taxpayer was in an unsound financial condition, and if the taxpayer makes and files at the time of filing the return, in such manner as the Commissioner, with the approval of the Secretary, by regulations prescribes, its consent to the regulations prescribed under section 113 (b) (3) then in effect. In such case the amount of any income of the taxpayer attributable to any unamortized premium (computed as of the first day of the taxable year in which such discharge occurred) with respect to such indebtedness shall not be included in gross income and the amount of the deduction attributable to any unamortized discount (com-

puted as of the first day of the taxable year in which such discharge occurred) with respect to such indebtedness shall not be allowed as a deduction. As used in this paragraph the term 'security' means any bond, debenture, note, or certificate, or other evidence of indebtedness, issued by any corporation, *in existence on June 1, 1939.* This paragraph shall not apply to any discharge occurring before the date of the enactment of the Revenue Act of 1939, or in a taxable year beginning after December 31, *1942.*" [1945]

The italicized provisions of the above-quoted section were *eliminated by the amendment* made to Section 22 (b) (9) in 1942. The date of applicability of said section was also extended in 1942 from December 31, 1942 to December 31, 1945. Except for these eliminations and extension of the date of its applicability, Section 22 (b) (9) was the same after its amendment in 1942 as it was in 1939. The period of its applicability was in no way changed except that it was *extended* to 1945.

Regulations Involved

The pertinent provisions of the Treasury Regulations applicable to Section 22 (b) (9) of the Internal Revenue Code, as enacted in 1939, are:

"Reg. 103, Sec. 19.22(b)(9)-1. **Income from discharge of indebtedness.**—(*a*) *Taxable years beginning after December 31, 1938, and before January 1, 1942.*—Section 22(b)(9) provides, *with respect to taxable years beginning after December 31, 1938, and before January 1, 1942,* a method whereby a corporation may elect to have excluded from its gross income the amount of income attributable to a discharge, within the taxable year, of its indebtedness or of indebtedness for which it is liable as, for example, in the case of a debt arising from an assumption of liability of another corporation. To be entitled to the benefits of the provisions of [Code]

section 22(b)(9) a corporation must (1) file with its return for the taxable year a consent to the provisions of the regulations in effect at the time of the filing of the return, prescribed under [Code] section 113(b)(3) (see [Reg.] *sections 19.113(b)(3)-1* and *19.113(b)(3)-2*, relating to adjustment of basis), and (2) establish that it was in an unsound financial condition immediately preceding the discharge of the indebtedness.

The existence of an unsound financial condition, for the purposes of [Code] section 22(b)(9), may be established (1) by satisfying the Commissioner of such condition upon a presentation to him of all facts pertinent to the financial condition of the corporation or (2) by having presented to the Commissioner a certification of such condition by any Federal agency (*e. g.*, the Reconstruction Finance Corporation) authorized to make loans to such taxpayer on behalf of the United States, or by any Federal agency (*e. g.*, the Interstate Commerce Commission) authorized to exercise regulatory power over the taxpayer. *Such a certification will be deemed to be conclusive upon the Commissioner.* The certification should accompany the return.

• • •

The pertinent provisions of the Treasury Regulations applicable to Section 22 (b) (9) of the Internal Revenue Code, as amended in 1942, are:

"Reg. 111, Sec. 29.22 (b) (9)-1. **Income from discharge of indebtedness.**—Section 22 (b) (9) provides, *with respect to taxable years beginning after December 31, 1941, and before January 1, 1946*, a method whereby a corporation may elect to have excluded from its gross income the amount of income attributable to a discharge, within the taxable year, of its indebtedness or of indebtedness for which it is liable as, for example, in the case of a debt arising from an assumption of liability of another corporation. To be entitled to the benefits of the pro-

visions of section 22 (b) (9) for such years a corporation must file with its return for the taxable year a consent to the provisions of the regulations, in effect at the time of the filing of the return, prescribed under section 113 (b) (3) (see sections 29.113 (b) (3)-1 and 29.113 (b) (3)-2, relating to adjustment of basis).

• • •

Net Operating Loss Carry-Over

The pertinent provisions of the law pertaining to the computation and deduction of petitioner's net operating loss carry-over for the years 1939 and 1940, are set forth in Sections 272 (g) and 122 of the Internal Revenue Code.

Section 272 (g) of the Code provides:

"(g) *Jurisdiction over Other Taxable Years.*—The Board in redetermining a deficiency in respect of any taxable year shall consider such facts with relation to the taxes for other taxable years as may be necessary correctly to redetermine the amount of such deficiency, but in so doing shall have no jurisdiction to determine whether or not the tax for any other taxable year has been overpaid or underpaid."

The pertinent provisions of Section 122 (applicable to the calendar year 1941, the year involved in this proceeding) are as follows:

"(a) *Definition of Net Operating Loss.*—As used in this section, the term 'net operating loss' means the excess of the deductions allowed by this chapter over the gross income, with the exceptions, additions, and limitations provided in subsection (d).

(b) *Amount of* • • • *Carry-Over.*—

• • •

(2) *Net Operating Loss Carry-Over.*—If for any taxable year the taxpayer has a net operating loss, such net operating loss shall be a net operat-

ing loss carry-over for each of the two succeeding taxable years, except that the carry-over in the case of the second succeeding taxable year shall be the excess, if any, of the amount of such net operating loss over the net income for the intervening taxable year computed (A) with the exceptions, additions, and limitations provided in subsection (d) (1), (2), (4), and (6), and (B) by determining the net operating loss deduction for such intervening taxable year without regard to such net operating loss and without regard to any net operating loss carry-back."

* * *

Litigation Expense

The pertinent provisions of the law pertaining to the expense of litigation involving petitioner's right *as a tenant* to the *use and occupancy* of a Power House, are as follows:

"Sec. 23. *Deductions from Gross Income.*

In computing net income there shall be allowed as deductions:

(a) Expenses.—

(1) Trade or Business Expenses.—

(A) In General.—All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business * * *."

Regulations 103, Sec. 19.24-2

The provisions of Regulation 103, Sec. 19.24-2 as quoted and cited by respondent in the Court below regarding the issue of litigation expense, are as follows:

"Sec. 19.24-2. *Capital expenditures.* * * * The cost of defending or perfecting title to property constitutes a part of the cost of the property and is not a deductible expense. * * * Expenses of the organization of a corporation, such as incorporation fees, attorneys' and accountants' charges, are capital expenditures and not deductible from gross income. * * *"

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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 253

BUSH TERMINAL BUILDINGS COMPANY, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Tax Court (R. 57-74) is reported at 17 T.C. 485. The opinion of the Court of Appeals (R. 108-113) is reported at 204 F. 2d 575.

JURISDICTION

The judgment of the Court of Appeals was entered on May 15, 1953. (R. 114-115.) The petition for a writ of certiorari was filed on August 12, 1953. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254.

QUESTIONS PRESENTED

1. Whether, under Section 22 (b)(9) of the Internal Revenue Code, the taxpayer, which was unable to establish to the satisfaction of the Commissioner that it was in an unsound financial condition either in 1940 or 1941, and which was found by the Tax Court not to have been in such a condition during these years, may exclude from its gross income for these years its gain on the discharge of its own indebtedness.

2. Whether, under Section 23 (a)(1)(A) of the Code, the taxpayer may deduct from its 1940 income as an ordinary and necessary business expense the cost of defending a leasehold interest.

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the statutes and Regulations involved will be found in the Appendix, *infra*, pp. 14-22.

STATEMENT

This proceeding involves an assessed deficiency in the taxpayer's income tax for 1941 based, among other things, upon the inclusion by the Commissioner in the taxpayer's income for 1940 and for 1941 of its gain during these years on the discharge of its own indebtedness and the denial by him of any deduction from its 1940 income for the expenses of certain litigation relating to its right as a tenant to the use and occupancy of a powerhouse. The Commissioner's action as to the taxpayer's income in 1940 affected the deficiency assessed for 1941 because it reduced the claimed net operating loss carry-over from the earlier year.

In 1940 and 1941, the taxpayer realized gain on the discharge of its own indebtedness through the purchase of its own first mortgage bonds in the open market at prices substantially below their face value. The amount of this gain was $242,790.36 in 1940 (7 T.C. at 795-796),[1] and $158,706.55 in 1941. (R. 59.)

The right of the taxpayer to exclude such gain from its gross income had been at issue in an earlier proceeding in the Tax Court involving its 1940 taxes. *Bush Terminal Buildings Co.* v. *Commissioner*, 7 T.C. 793. Likewise in issue in that earlier proceeding was the deductibility of certain expenses, including the costs of the litigation relating to the right of the taxpayer to the use and occupancy of a certain powerhouse. (R. 38, 43, 105-107.) Both questions had been resolved against the taxpayer. 7 T.C. at 803-811, 818-819.[2] The Tax Court there found that the taxpayer was not in an unsound financial condition in 1940 and consequently not

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[1] The findings of fact in *Bush Terminal Buildings Co.* v. *Commissioner*, 7 T.C. 793, were incorporated by reference into the findings of fact in this proceeding. (R. 65.) The record in the other proceeding insofar as it pertained to the "bond purchase income" and to the "Reserve for Reorganization Expenses" was retained as evidence in this proceeding. (R. 2, 17-20.)

[2] The Commissioner pleaded *res judicata* in this proceeding based upon the decision of the Tax Court in the prior proceeding insofar as the petition pleads error by him in the computation of the taxpayer's net operating loss carry-over from 1940. (Tr. 21-22.) The court below, because of its disposition of the issues in this case on their merits, did not consider whether the taxpayer was in fact concluded by the previous proceeding from relitigating its 1940 income. In the event this Court grants certiorari, the Government reserves the right to argue that collateral estoppel bars such relitigation.

entitled under Section 22 (b) (9) to exclude the gain from the purchase of its own bonds from its gross income. 7 T.C. at 803-811. Because, however, of the determination of other issues in that proceeding in favor of the taxpayer, the result was a decision of no deficiency. (R. 21.) Neither side took an appeal. (R. 20.)

On September 16, 1950, after the decision of the Tax Court in the earlier proceeding and after the Commissioner had assessed a deficiency for 1941, and this proceeding to review his action had been initiated (R. 1), the taxpayer mailed the Commissioner a letter, dated September 12, 1950, bearing the letterhead of the chambers of Judge Inch, Chief Judge of the United States District Court for the Eastern District of New York, and signed by Judge Inch, which read in part (R. 49, 65):

> this is to CERTIFY that during all of the years 1940 and 1941 the Bush Terminal Buildings Company * * * was in an unsound financial condition; and that during all of said years the United States District Court for the Eastern District of New York had jurisdiction of and exercised regulatory power and control over the said Bush Terminal Buildings Company.

During both 1940 and 1941, the taxpayer was in a reorganization proceeding under Section 77B of the Bankruptcy Act in the United States District Court for the Eastern District of New York, and was operating under a plan of reorganization approved in April, 1937. (R. 60, 65.)

The Tax Court rejected the letter of Judge Inch

as conclusive on the question of the taxpayer's financial status in 1940 and 1941 (R. 68-71), and in reliance, in part, on its former decision (R. 67-68, 71-72, 74), determined against the taxpayer each of the issues submitted to it in this proceeding. The Court of Appeals, passing the question of *res judicata* (R. 113), affirmed on the merits (R. 109-113).

ARGUMENT

1. Prior to its amendment by the Revenue Act of 1942, Section 22 (b)(9) of the Internal Revenue Code (Appendix, *infra*, pp. 14-15) permitted a corporation to exclude the gain from the discharge of its own indebtedness from its gross income only if at the time of such discharge the taxpayer was in an unsound financial condition. This condition had to be either established to the satisfaction of the Commissioner or certified to him "by any Federal agency authorized to make loans on behalf of the United States to such corporation or by any Federal agency authorized to exercise regulatory power over such corporation."

As the court below pointed out (R. 111-112), the Commissioner of Internal Revenue, by assessing deficiencies against the taxpayer predicated upon including in its income for 1940 and 1941 its gain from the discharge of its indebtedness during these years, indicated that the taxpayer had not established its unsound financial condition to his satisfaction. Nevertheless, the taxpayer contends that it is entitled to have such gain excluded from its gross income.

First, it argues that the amendments to Section

22 (b)(9) made by the Revenue Act of 1942, eliminating the requirement that a corporation claiming the benefits of that section be in an unsound financial condition, were retroactive to the taxable years in question. (Pet. 6-8.) Second, it contends that the certification by Judge Inch as to its financial condition in 1940 and 1941 was a certification by a "Federal agency" and conclusive upon the Commissioner. (Pet. 8-9.) Both contentions were correctly rejected by the court below.

The first section of the Revenue Act of 1942, c. 619, 56 Stat. 798, Section 101,[3] specifically provides that the amendments it makes are to be given prospective application only, unless specific directions to the contrary appear. Where the amendments made by the 1942 Act were intended to operate retroactively, language explicitly designed to accomplish that purpose was employed. This is nowhere more clearly demonstrated than in the very section which amended the law governing income from the discharge of indebtedness.

The Revenue Bill of 1942, as originally reported to and passed by the House, made only one change in the law relating to income to corporations from the discharge of indebtedness. Section 112 extended the relief afforded by Section 22 (b)(9) for three years. H. Rep. No. 2333, 77th Cong., 2d Sess., p.

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[3] Section 101 reads as follows:

> Except as otherwise expressly provided, the amendments made by this title shall be applicable only with respect to taxable years beginning after December 31, 1941.

69 (1942-2 Cum. Bull. 372, 425). The Senate Committee on Finance, to which the House bill was referred, vastly enlarged the scope of Section 112, renumbered it Section 114 (Appendix, *infra*, pp. 17-19) and redrafted it in the form in which it was eventually enacted. As redrafted, the new Section 114 contained three subsections. The first subsection, (a), amended Section 22 (b)(9), *inter alia*, by extending it three years (as provided by the House) and by eliminating the requirement that a corporation be in an unsound financial condition to qualify for the relief the section afforded. The second subsection (b), added a new paragraph (10) to Section 22 (b) covering the discharge of indebtedness of a railroad in certain circumstances. The third subsection (c), made subsection (b) retroactive. Subsection (c) provided "The amendment made by subsection (b) shall be applicable to taxable years beginning after December 31, 1939."

That this language was deliberately selected to limit retroactivity to subsection (b), which added paragraph (10) to Section 22 (b), and to deny retroactivity to subsection (a) which amended paragraph (9) of Section 22 (b) was put beyond question by the Committee Report explaining the changes. This report read: "Section 22 (b)(9) as amended will not apply retroactively and will be applicable only to taxable years beginning after December 31, 1941, and before January 1, 1946." S. Rep. No. 1631, 77th Cong., 2d Sess., p. 78 (1942-2 Cum. Bull. 504, 564).

The argument in the taxpayer's petition (p. 7),

rejected by both courts below, that any amendment to Section 22 (b) (9) was automatically retroactive because of the language in that section making it inapplicable to a "discharge occurring before the date of the enactment of the Revenue Act of 1939," scarcely merits consideration. That language was employed in the Revenue Act of 1939 to establish the effective date of the original section. The retroactive effect of an amendment to this section must be determined by the language of the amendment, not by the date upon which the original section was first effective.

It is difficult to see how Congress could have indicated more explicitly that the changes made by subsection (a) of Section 114 of the Revenue Act of 1942 (Appendix, *infra*, pp. 17-18) in Section 22 (b) (9) of the Internal Revenue Code were not to be applied retroactively, nor how it could have used language better adapted to accomplish that purpose. But if the Act could claim "a double sense, it is the command of the cases, that that which rejects retroactive operation must be selected." *Shwab* v. *Doyle*, 258 U.S. 529, 535; *Hassett* v. *Welch*, 303 U.S. 303, 314; *Brewster* v. *Gage*, 280 U.S. 327, 337; *Commissioner* v. *Commodore, Inc.*, 135 F. 2d 89 (C.A. 6th); *Girard Inv. Co.* v. *Commissioner*, 122 F. 2d 843, 846 (C.A. 3d), certiorari denied, 314 U.S. 699. 2 Sutherland, *Statutory Construction* (Lewis ed. 1940), Section 641; 1 Paul and Mertens, *Law of Federal Income Taxation*, Section 3.25.

None of the decisions cited by the taxpayer (Pet. 6), as in conflict with the decision of the court below

are even remotely in point. The issue was one of first impression and was correctly decided by the court below.

The Court of Appeals was also clearly correct in refusing to recognize the letter by Judge Inch as a certification within the meaning of Section 22(b)(9) by any "Federal agency authorized to exercise regulatory power over such corporation" (R. 111.) The phrase "Federal agency" is customarily used to refer to Departments and other units in the executive branch of the Government. See, *e.g.*, the definition of "Federal agency" in the Tort Claims Act (28 U.S.C. 2671) and the definition of "agency" in the Administrative Procedure Act (5 U.S.C. 1001). Again, it is highly improbable that Congress intended to lump constitutional courts, which may determine only cases or controversies, under the heading of Federal agencies "authorized to exercise regulatory power" over corporations. The legislative history indicates that Congress in referring to a "Federal agency" had in mind, not a court, but the Interstate Commerce Commission. The measure was suggested by the railroads and endorsed by the Chairman of the R.F.C. House Hearings before the Committee on Ways and Means, 76th Cong., 1st Sess., Revenue Revision—1939, pp. 232-248, 283-284. The provision for certification by a federal agency was added by the Senate Finance Committee to the measure as passed by the House. Its purpose, as explained in the Committee report, was to permit utilization of the knowledge various government agencies

possessed of the financial condition of "many corporations (such as railroads) that will endeavor to bring themselves under the provisions of the new paragraph (9)." S. Rep. No. 648, 76th Cong., 1st Sess., p. 5 (1939-2 Cum. Bull. 524, 527). In the case of railroads, the I. C. C. is such an agency and is aptly described by the language which Congress used.

Even if the intent of the Congress was less clear, the phrase "Federal agency" should not be construed to include the courts. The certification to the Commissioner of Internal Revenue under Section 22 (b) (9) of the fact that a taxpayer is in an unsound financial condition is not the decision of a case or controversy, but is simply one step in determining the tax consequences to a corporation of the discharge of its own indebtedness. Consequently, had Congress intended to impose upon constitutional courts, such as the District Court for the Eastern District of New York, the duty of certifying to the Commissioner the unsound financial condition of a taxpayer, Section 22 (b) (9) might well be unconstitutional. *Hayburn's Case,* 2 Dall. 408; *United States* v. *Ferreira,* 13 How. 40. In deference to the well established rule of statutory construction, that where an act is susceptible of two interpretations, one of which will raise serious constitutional questions, the other is to be adopted (*Linder* v. *United States,* 268 U.S. 5, 17-18; *Wright* v. *Vinton Branch,* 300 U.S. 440, 461; *Crowell* v. *Benson,* 285 U.S. 22, 62), the words "Federal agency," as used in Section 22 (b) (9), must be in-

terpreted as limited to agencies within the executive branch and not as including constitutional courts.

Furthermore, even if the District Court for the Eastern District of New York were a Federal "agency", its certificate came too late. The applicable Treasury Regulations provide that the certificate should accompany the return. Treasury Regulations 103, Section 19.22 (b) (9)-1, Appendix, *infra*, p. 21. Certification by a Federal agency of a taxpayer's financial condition in lieu of a determination by the Commissioner was intended to avoid duplication of effort.[5] In this case, the purported certificate by Judge Inch as to taxpayer's financial condition in 1940 and in 1941, came long after the Commissioner had made his determination for both years, after his action for the year 1940 had been reviewed by the Tax Court, and after a petition to review his determination for 1941 had been filed in that court.

2. The decision of the court below that the taxpayer's expenses in connection with defending its leasehold interest were not deductible as ordinary

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[5] The report of the Senate Finance Committee said on this point: "It seems desirable to utilize information obtained by various agencies of the Government and thus relieve the Commissioner of Internal Revenue from the necessity of making an independent finding in each case as to the financial condition of the corporate taxpayer." S. Rep. No. 648, *supra*, p. 5. Mr. Cooper in explaining the Senate amendment to the House, repeated the same idea, saying, "Instead of the Commissioner's having to duplicate all of the work of investigation done by the R.F.C. or some other governmental agency he accepts that finding made by them and the certificate issued by them." 84 Cong. Record, Part 7, p. 7803.

and necessary business expenses is clearly correct and not in conflict with the decision of any other court. For many years, the Treasury has had a regulation that the cost of defending or perfecting title to property constitutes a part of the cost of the property and is not a deductible expense. Treasury Regulations 103, applicable to the year 1940 so provides. Section 19.24-2 (Appendix, *infra*, p. 22). There can be no question that a leasehold interest is property. *Commissioner* v. *Golonsky*, 200 F. 2d 72, 73-74 (C.A. 3d), certiorari denied, 345 U.S. 939. Consequently, the cost of acquiring or defending a leasehold interest is not a deductible expense. *Blackwell Oil & Gas Co.* v. *Commissioner*, 60 F. 2d 257 (C.A. 10th); *McDuffie* v. *United States*, 19 F. Supp. 239 (C. Cls.); *Lido Building Co.* v. *Commissioner*, 31 B.T.A. 461, 464; *Columbia Theatre Co.* v. *Commissioner*, 3 B.T.A. 622, 628. See also, *Murphy Oil Co.* v. *Burnet*, 55 F. 2d 17 (C.A. 9th), affirmed on other grounds, 287 U.S. 299; *South American Gold & Platinum Co.* v. *Commissioner*, 8 T. C. 1297, affirmed, 168 F. 2d 71 (C.A. 2d). The cases so holding are not limited to mineral leases nor do they rest on the peculiarities of such leases, as suggested by the taxpayer. (Pet. 12-13.) None of the cases cited by the taxpayer as contrary to the decision below concern a leasehold interest. The result reached below is clearly the only one consonant with the controlling Regulations.

CONCLUSION

The decision below is correct. There is no conflict of decisions and further review is not warranted. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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SEPTEMBER, 1953.

APPENDIX

Internal Revenue Code:

SEC. 22. GROSS INCOME.

(b) *Exclusion from Gross Income.*—The following items shall not be included in gross income and shall be exempt from taxation under this chapter:

* * * * *

(9) [as added by Sec. 215(a), Revenue Act of 1939, c. 247, 53 Stat. 862] *Income from Discharge of Indebtedness.*—In the case of a corporation, the amount of any income of the taxpayer attributable to the discharge, within the taxable year, of any indebtedness of the taxpayer or for which the taxpayer is liable evidenced by a security (as hereinafter in this paragraph defined) if—

(A) it is established to the satisfaction of the Commissioner, or

(B) it is certified to the Commissioner by any Federal agency authorized to make loans on behalf of the United States to such corporation or by any Federal agency authorized to exercise regulatory power over such corporation,

that at the time of such discharge the taxpayer was in an unsound financial condition, and if the taxpayer makes and files at the time of filing the return, in such manner as the Commissioner, with the approval of the Secretary, by regulations prescribes, its

consent to the regulations prescribed under section 113(b)(3) then in effect. In such case the amount of any income of the taxpayer attributable to any unamortized premium (computed as of the first day of the taxable year in which such discharge occurred) with respect to such indebtedness shall not be included in gross income and the amount of the deduction attributable to any unamortized discount (computed as of the first day of the taxable year in which such discharge occurred) with respect to such indebtedness shall not be allowed as a deduction. As used in this paragraph the term "security" means any bond, debenture, note, or certificate, or other evidence of indebtedness, issued by any corporation, in existence on June 1, 1939. This paragraph shall not apply to any discharge occurring before the date of the enactment of the Revenue Act of 1939, or in a taxable year beginning after December 31, 1942.

* * * * *

(26 U.S.C. 1940 ed., Sec. 22.)

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

(a) [as amended by Sec. 121(a), Revenue Act of 1942, c. 619, 56 Stat. 798]. *Expenses.*—

(1) *Trade or Business Expenses.*—

(A) *In General.*—All the ordinary and necessary expenses paid or incurred dur-

ing the taxable year in carrying on any trade or business, including a reasonable allowance for salaries or other compensation for personal services actually rendered; * * *

* * * * *

(26 U.S.C. 1946 ed., Sec. 23.)

SEC. 122 [as added by Sec. 211(b), Revenue Act of 1939, *supra,* and as amended by Sec. 105 (e), Revenue Act of 1942, *supra*]. NET OPERATING LOSS DEDUCTION.

(a) *Definition of Net Operating Loss.*—As used in this section, the term "net operating loss" means the excess of the deductions allowed by this chapter over the gross income, with the exceptions, additions, and limitations provided in subsection (d).

(b) [as amended by Sec. 153(a), Revenue Act of 1942, *supra*]. *Amount of Carry-Back and Carry-Over.*—

* * * * *

(2) *Net operating loss carry-over.* If for any taxable year the taxpayer has a net operating loss, such net operating loss shall be a net operating loss carry-over for each of the two succeeding taxable years * * *.

* * * * *

(26 U.S.C. 1946 ed., Sec. 122.)

Revenue Act of 1942, c 619, 56 Stat. 798:

SEC. 114. EXCLUSION OF INCOME FROM DISCHARGE OF INDEBTEDNESS.

(a) *General Rule.*—Section 22 (b)(9) (relating to exclusion from gross income of corporate income derived from discharge of indebtedness) is amended to read as follows:

"(9) *Income from Discharge of Indebtedness.*—In the case of a corporation, the amount of any income of the taxpayer attributable to the discharge, within the taxable year, of any indebtedness of the taxpayer or for which the taxpayer is liable evidenced by a security (as hereinafter in this paragraph defined) if the taxpayer makes and files at the time of filing the return, in such manner as the Commissioner, with the approval of the Secretary, by regulations prescribes, its consent to the regulations prescribed under section 113(b)(3) then in effect. In such case the amount of any income of the taxpayer attributable to any unamortized premium (computed as of the first day of the taxable year in which such discharge occurred) with respect to such indebtedness shall not be included in gross income and the amount of the deduction attributable to any unamortized discount (computed as of the first day of the taxable year in which such discharge occurred) with respect to such indebtedness shall not be allowed as a deduction. As used in this paragraph the term 'security' means any bond,

debenture, note, or certificate, or other evidence of indebtedness, issued by any corporation. This paragraph shall not apply to any discharge occurring before the date of enactment of the Revenue Act of 1939, or in a taxable year beginning after December 31, 1945."

(b) *Railroad Corporations—Discharge of Indebtedness in Certain Judicial Proceedings.*—Section 22(b) (relating to exclusions from gross income) is amended by inserting at the end thereof the following new paragraph:

"(10) *Income from Discharge of Indebtedness of a Railroad Corporation.*—The amount of any income attributable to the discharge, within the taxable year, of any indebtedness of a railroad corporation, as defined in section 77m of the National Bankruptcy Act, as amended, to the extent that such income is deemed to have been realized by reason of a modification in or cancellation in whole or in part of such indebtedness pursuant to an order of a court in a receivership proceeding or in a proceeding under section 77 of the National Bankruptcy Act, as amended. In such case the amount of any income of the taxpayer attributable to any unamortized premium (computed as of the first day of the taxable year in which such discharge occurred) with respect to such indebtedness shall not be included in gross income and the amount of the deduction attributable to any unamortized discount (computed as of the first day of the taxable year in which such discharge occurred) with

respect to such indebtedness shall not be allowed as a deduction. Paragraph (9) shall not apply with respect to any discharge of indebtedness to which this paragraph applies. This paragraph shall not apply to any discharge occurring in a taxable year beginning after December 31, 1945."

(c) *Taxable Years to which Amendment Applicable.*—The amendment made by subsection (b) shall be applicable to taxable years beginning after December 31, 1939.

Treasury Regulation 103, promulgated under the Internal Revenue Code:

* * * * *

SEC. 19.22(a)-18. *Sale and purchase by corporation of its bonds.*—(1)(a) If bonds are issued by a corporation at their face value, the corporation realizes no gain or loss. * * * If, however, the corporation purchases any of such bonds at a price less than the issuing price or face value, the excess of the issuing price or face value over the purchase price is gain or income for the taxable year.

* * * * *

(3) (a) If bonds are issued by a corporation at a discount, the net amount of such discount is deductible and should be prorated or amortized over the life of the bonds. * * * (c) If, however, the corporation purchases any of such bonds at a price less than the issuing price plus any amount of discount already deducted, the excess of the issuing price, plus any amount of discount already deducted (or of the face value minus any amount of discount not yet deducted), over the purchase price is gain or income for the taxable year.

* * * * *

For exclusion from gross income of income attributable to discharge of indebtedness of a corporation in an unsound financial condition, see section 19.22 (b)(9)-1.

SEC. 19.22(b)(9)-1 [as amended by T. D. 5238, 1943 Cum. Bull. 79, and T. D. 5260, 1943 Cum. Bull. 100]. *Income from discharge of indebtedness.* (a) *Taxable years beginning after December 31, 1938, and before January 1, 1942.* Section 22(b)(9) provides, with respect to taxable years beginning after December 31, 1938, and before January 1, 1942, a method whereby a corporation may elect to have excluded from its gross income the amount of income attributable to a discharge, within the taxable year, of its indebtedness or of indebtedness for which it is liable as, for example, in the case of a debt arising from an assumption of liability of another corporation. To be entitled to the benefits of the provisions of section 22(b)(9) a corporation must (1) file with its return for the taxable year a consent to the provisions of the regulations, in effect at the time of the filing of the return, prescribed under section 113(b)(3) (see sections 19.113(b)(3)-1 and 19.113(b)(3)-2, relating to adjustment of basis), and (2) establish that it was in an unsound financial condition immediately preceding the discharge of the indebtedness.

The existence of an unsound financial condition, for the purposes of section 22(b)(9), may be established (1) by satisfying the Commissioner of such condition upon a presentation to him of all facts pertinent to the financial condition of the corporation or (2) by having presented to the Commissioner a certification of such condition by any Fed-

eral agency (e.g., the Reconstruction Finance Corporation) authorized to make loans to such taxpayer on behalf of the United States, or by any Federal agency (e.g., the Interstate Commerce Commission) authorized to exercise regulatory power over the taxpayer. Such a certification will be deemed to be conclusive upon the Commissioner. The certification should accompany the return.

* * * * *

With respect to any taxable year beginning after December 31, 1938, and before January 1, 1942, discharges of indebtedness occurring (1) in a taxable year beginning after December 31, 1938; (2) after June 29, 1939; (3) in a taxable year beginning prior to January 1, 1942, are governed by the provisions of section 22(b)(9) prior to its amendment by the Revenue Act of 1942 and by the provisions of this subsection.

* * * * *

(b) *Taxable years beginning after December 31, 1941, and before January 1, 1946.* * * * The requirement with respect to unsound financial condition prescribed for years covered by subsection (a) of this section does not apply with respect to discharges of indebtedness occurring in taxable years beginning after December 31, 1942, and before January 1, 1946.

* * * * *

SEC. 19.24-2. *Capital expenditures.* * * * The cost of defending or perfecting title to property constitutes a part of the cost of the property and is not a deductible expense. * * *

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